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No. 86--

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROY B. BROOKS, LELAND I. AMMONS,

REX L. CAREY, MINNIE L. DAVID,

WILLIAM J. FERGESON, CARL R. GROSS,

BETTY J. REECE AND O. DEAN BRIDGES

PETITIONERS,

V.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR CERTIORARI

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December 8, 1986

32 pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit abused its discretion in refusing to grant petitioners' motions for rehearing of its decision to dismiss petitioners' claims for the stated reason of failure to prosecute their claims under the rules?

2. May a federal circuit court rigidly enforce times for filing of briefs against petitioners, whose attorney has exhibited mental and physical incapacity?

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JURISDICTION

Petitioners seek review of the September 9, 1986, denial of petitioners' motion for rehearing and to vacate the mandates of July 21 and 24, 1986, which motions sought to reverse a June 13, 1986 judgment dismissing the petition for failure to prosecute in accordance with the rules.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

A. Constitutional Provision

The 14th Amendment:

> "No state shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

B. Statutes

Federal Rules of Appellate Procedure Rules

2, 31(c) and 40.

Local Rule 23, U.S. Court of Appeals for the Federal Circuit.

Federal Rules of Civil Procedure Rule 60(b)(1) and 60(b)(6).

STATEMENT OF THE CASE

This case was docketed in the United States Court of Appeals for the Federal Circuit on February 6, 1986, and calendered for submission to the Court during the first full week of July-August term, 1986. The petitions sought review of an adverse decision resulting from hearings before the Merit Systems Protection Board.

This is a consolidation of two cases presenting identical facts and questions law for the the Court.

Petitioners' brief in the case was originally due on April 7, 1986. An extension of time was granted on motion to May 7, 1986. On June 13, 1986, without any prior notice to petitioners and without any pending motion to dismiss filed by the Respondent Department of Health and Human Services, the court of appeals entered its judgement, and dismissed the case for failure to prosecute in accordance with the rules.

Within ten days of receipt of the notice of dismissal, petitioners filed a motion for rehearing and to vacate the order of dismissal, and also filed a Motion for leave to file their brief out of time, such motion being accompanied by the briefs. On July 9, 1986, the court

denied petitioners' motions. Petitioners subsequently filed an additional motion for rehearing and to vacate the mandate which was issued by the Court on July 21, 1986. On September 9, 1986, the court of appeals denied this motion. petitioners now seek a review on writ of certiorari to this Court.

The basis for federal jurisdiction in the original appeal to the Merit Systems Protection Board is 5 C.F.R. § 351.901 and § 1201.22.

REASONS FOR GRANTING THE WRIT

The due process issue involved is whether or not the petitioners' "day in court" on the substantive issues will be denied them due to their counsel's conduct which transcended the bounds of professional incompetence, becoming mental incompetence.

Petitioners here contend that the

court of appeals has departed from the accepted and usual course of judicial proceedings, calling for some exercise of this Court's power of supervision. More specifically, petitioners contend that under the factual circumstances presented in this case, refusal of the court of appeals to grant petitioners' motions for rehearing and to vacate the judgment and mandate was an abuse of discretion tantamount to denial of petitioners' due process rights of law.

Petitioners are part of a group of former employees of the Community Services Administration who were adversely affected by the close out and transfer of agency functions to the Department of Health and Human Services on September 30, 1981. Since that time, the eight petitioners here have diligently pursued their claims. Following remand of their individual cases for hearing by the regional offices of the

Merit Systems Protection Board, petitioners followed prescribed appeals procedure. See Certain Former Community Services Administration Employees v. Department of Health and Human Services, 762 F.2d 978 (Fed. Cir. 1985).

The first court action was filed on behalf of the employees in September, 1981, and the individual hearings on remand were conducted by the Dallas Region Merit Systems Protection Board on August 20-23, 1985. Having been unsuccessful in the individual hearing process, petitioners timely filed their petitions for review on November 25, 1985, and the court of appeals set the cases for briefing and submission to the court on February 6, 1986, with a due date for petitioners' brief of April 7, 1986. One extension of time of 30 days was secured by petitioners, and the briefs were actually transmitted to the court of

appeals on June 12 and 20, 1986, accompanied by a motion for leave to file out of time.

While acknowledging that the briefs were thus filed over 30 days after the last due date, petitioners pointed out to the court of appeals that for over five and one-half years, they had diligently, at great personal expense and inconvenience, pursued their claims seeking final determination. To at long last, have them now extinguished due to misconduct of their counsel, for reasons which might be categorized as excusable neglect, to file the briefs in a timely manner petitioners argued, was a denial of fundamental fairness and a breach of due process.

Counsel for petitioners assured the court of appeals that he had been mindful of the extreme importance of complying with the Federal Rules of Appellate Procedure and the courts own local rules, and that his actions had not been in

callous disregard of the need for timely filings and orderly progression of cases through the docket system. Counsel further stated that he deeply regreted the sequence of events that led to this stage of litigation and to the possible disruption of the courts efforts to function smoothly while handling a staggering case load.

Petitioners counsel conferred with counsel for respondents in securing the extension of time. Subsequently, petitioners counsel had numerous conversations with the regional Department of Human Services attorney who had represented respondent in the Merit System Protection Board hearings, and whom he believed to be working with the counsel of record in the court of appeals, and thereby communicating the status of the case. The local DHHS attorney erroneously gave petitioners counsel the impression that the delay in

completing the brief was acceptable to respondent, and in his confused state of mind at the time, he erroneously relied on that impression. By his conduct he never intended to abandon the case, despite apparent setbacks to his attempts to complete the brief in a timely manner. Not knowing of any objection from respondent or the court, counsel completed the briefs and filed them thinking there remained time for the government's response before the court's July-August term consideration of the case.

As petitioners recounted in their Motion to Vacate the Order of Dismissal filed on June 30, 1986, Counsel failed to timely file the brief due to mental and physical illness during the time period in question, and due to severe overextension of his diminished capacity to handle his caseload as a sole practitioner practicing from his residence. These situations

coalesced to reduce counsel to a deep depressive mood debilitating his normal functioning, including his ability to meet longstanding deadlines. (See Appendix "A" - Affidavit of Prior Counsel at 25.) Although counsel was finally able to emerge from this state of emotional exhaustion in order to finish and submit the briefs in the two cases consolidated here, several symptoms of his true mental state remained, which were unknown to petitioners at that time. In addition to the eight petitioners here, ten other appellants had also retained him as counsel to perfect appeals to the court of appeals from their adverse hearing results in the regional hearings conducted by the Merit Systems Protection Board. The rights of all these ten to a hearing were lost immediately when counsel did not timely file a petition for review.

Respondent, in its opposition to petitioners' motion for leave to file the brief out of time, argued the proposition that the petitioners "cannot avoid the consequences of the actions or omissions of their freely chosen representative." Petitioners understand that they must be judged through their representative and that he alone speaks for them. Petitioners asserted however, that while recognizing the need for timely filings, the draconian remedy of dismissal, for their counsel's failure, without any consideration of the merits of their claim was overly severe under the circumstances. See United States v. Raimondi, 760 F.2d 460 (2nd Cir. 1985). None of the cases cited by respondent were comparable to the facts in this case. In Weston v. The Department of Housing and Urban Development, 724 F.2d 943, 951 (Fed. Cir. 1983), the court of appeals upheld the dismissal

of a government employee who refused to cooperate in an internal agency investigation on advice of counsel, despite various safeguards and offers of immunity. The court did not accept the appellant's claim of error by his counsel in the advise given not to cooperate as adequate grounds for his actions.

In Massingale v. Merit Systems Protection Board, 736 F.2d 1521 (Fed. Cir. 1984), the court of appeals dismissed as untimely an appeal from the Merit Systems Protection Board which was filed some two years (emphasis added) after the appellant's removal from his government position. Appellant attempted to rely on his union's advice as to the proper appellant route to follow, and thereby failed to file an appeal during the statutory period. Timely filing of an appeal was the issue, not the subsequent filing of a brief, which while important, is certainly

not of the same magnitude as the filing of the appeal itself, which is subject to non-discretionary time limitations.

In Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962), the Supreme Court applied the cited rule to a case where the attorney for the appellant failed to attend a pretrial conference in the District Court, and where there was a history of delays and untimely action by the appellant's counsel going back over a six-year period. The Court upheld the dismissal for want of prosecution and the stated circumstances as being within the district court's permissible range of discretion under the facts of the case. In contrast, the petitioners here have assiduously followed the procedural rules in their cases for the last five years, filed their appeals on time, timely appeared for their hearings and timely filed with the court of appeals. The

tardy brief in question, was hardly comparable to the flagrant circumstances set forth in Link, Weston or Massingale.

Similarly, in other cases before the court of appeals, much more patent violations of the procedural rules have occurred, justifying dismissals.

Johnson v. Department of Treasury, 721 F.2d 361, 365 (Fed. Cir. 1983) involved an appellant who had requested two continuances at the Merit Systems Protection Board level, and who was appealing a dismissal after denial of a third request for a continuance and failure to appear at the Board hearing on the scheduled date. Such blatant disregard for timely prosecution of their case was not exhibited by petitioners here.

Dismissal for violation of procedural rules is discussed in Community Coalition for Media Change v. F.C.C., 646 F.2d 613

(D.C. Cir. 1980), where the court of appeals upheld dismissal when it found circumstances reflecting a conspicuous disregard for the rules. Once again, petitioners pointed out that this case is not comparable in severity, scope and magnitude with the infractions cited above.

Petitioners therefore asked the court of appeals to exercise leniency by recognizing the extraordinary circumstances under which the brief was late, and the limited degree of petitioners' errancy, in the context of the ongoing history of the case, Cf. United States v. Raimondi, supra, and therefore grant their motions for rehearing.

The federal district courts are guided in the matter of granting relief from a final judgment by Rule 60 (b)(1) and 60 (b)(6) of the Federal Rules of Civil Procedure, which permit relief for

mistake, inadvertance, and excusable neglect, among other reasons, ((b)(1)), or "any other reasons justifying relief from the operation of the judgment." ((b)(6)). What the courts have said in interpreting those rules is instructive here. For example, in Griffen v. Swim-Tech Corp., 722 F.2d 677 (5th Cir. 1984), the court of appeals discussed Rule 60, relating it to the "incessant command" of the court's conscience that justice be done in light of all the facts, and that mechanical application of the rules not overshadow the substantive issues and the right of claimants to be heard and obtain justice. The district court in Brown v. Clark Equipment Co. 96 F.R.D. 166 (D.C.Me. 1982) noted that the courts have the power to vacate judgments inherently whenever such action would be appropriate to accomplish justice, while the district court in Liberty National Bank & Trust Co. v.

Yackovich, 99 F.R.D. 518 (D.C.Pa. 1982), addressed the balance which it said must be maintained between the conflicting principles that litigation must be brought to an end, and that justice must be done.

Continuing that dichotomy, the Supreme Court in Link, supra, discussed the issue of whether lack of notice of impending dismissal and a chance to remedy the situation before such drastic action is taken violates the Court's sense of due process. The Court noted that the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing on such action might violate due process, depending on the circumstances, citing Anderson National Bank v. Luckett, 321 U.S. 233 (1943). In Luckett, the Supreme Court stated that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard

the right for which the constitutional protection is invoked." Put a different way, the Court in Link stated that the "adequacy of notice turns on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." (320 U.S. 634).

As the brief was being completed in June of 1986, petitioners had no clue that a dismissal was forthcoming. Petitioners were not informed by their counsel that there was a time problem, there was no inquiry from the clerk of the court of appeals concerning the case, and there was no inquiry from respondent's Washington counsel as to the delay and its possible impact on his reply time before the term of court, and finally there was no pending motion to dismiss for failure to prosecute.

Petitioners, of course do not claim a right to notice of impending dismissal for

want of prosecution. Rather, they are saying that the lack of such notice considering the short time period of delay involved in relation to the overall length of the total litigation, given the reasons of the delay and the absence of any evidence of overt and willful disregard of the rules by petitioners, should have weighed in favor of granting lienency to petitioners and might have tipped the scales in favor of granting a rehearing. Had petitioners been noticed of pending dismissal, or if a motion to dismiss had been under consideration, then the failure of petitioners to timely respond would properly call down the ultimate sanction of dismissal, and the court of appeals would have properly exercised its discretion. Such was not the case here. Counsel for petitioners had gone through a period of professional embarassment, ridicule, and personal anguish on behalf

of his clients and himself. The consequences of his actions may indeed signal the end of his professional career, as disgruntled clients in the instant matter pursue bar grievance and malpractice remedies. Petitioners argued to the court of appeals that no good purpose would be further served by allowing the dismissal to stand, and that petitioners should not be forced to be forever denied their hearing on the merits as a consequence of their counsel's disability. The court of appeals turned a deaf ear to these pleas. The briefs in question were subsequently prepared and filed and the court of appeals could have reinstated the case on its docket and proceeded to judgment on the merits, while well serving the ends of justice and not harming the interests of the respondent governmental agency.

Indeed, the granting of a rehearing and restoring the case to the court of

appeals docket would in no way prejudice or injure respondent U. S. Department of Health and Human Services. If uncorrected, respondent agency has unfairly profited as a result of the omissions and disabilities of petitioners' counsel, and thereby has avoided any consequences resulting from a judgment on the merits. Reinstatement would still result in punishment to the petitioners, in having their case delayed several months on the court of appeals docket, in addition to the mental anguish suffered by themselves and their families during this process. Justice would be served by petitioners' claims being ajudged on their own strength, not preemptorally because of a procedural mistake.

SIGNIFICANCE OF THE UNDERLYING ISSUE

This case, on the merits, presents an important issue of the court of appeals

decision in Certain Former CSA Employees, supra at 7, to not follow this Court's holding in Vitarelli v. Seaton, 359 U.S. 535 (1959), that the remedy for harmful error in effecting the separation of federal employees is reinstatement with back pay subject to any further lawful separation order, which cannot then be deemed retroactive. The court of appeals apparently held that lawful remedies available to an individual, Vitarelli, are not available to groups of employees treated similarly by their agency.

The action of the court of appeals in dismissing this appeal for a short lapse in a long chain of litigation, forecloses any further consideration of this matter vitally affecting petitioners welfare, either by the court of appeals itself, or by this Court.

CONCLUSIONS

Petitioners, therefore, ask this Court to apply the rationale set forth in the Link and Luckett cases, supra, and find that, under the circumstances of this case, that the denial of rehearing to these petitioners was an abuse of discretion by the court of appeals, resulting in injustice to petitioners.

For all of these reasons, a writ of certiorari should be granted now and this case should be set for argument.

Respectfully submitted,

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December 8, 1986

APPENDIX "A"

AFFIDAVIT OF PRIOR COUNSEL

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared JOHN M. STOKES, who is known to me to be the person stated, and after having been by me duly sworn, on his oath deposed as follows:

"The statements made in the foregoing Petition for Writ of Certiorari are true and correct to the best of my knowledge and belief.

"The failure to timely file the briefs was not due to any action or failure to act, by the petitioners, but was solely my fault. I was honestly operating under the impression that the government had no objection to the delay

in briefing, and it was in communication with local agency counsel during this period."

"I am very mindful of the need to follow court schedules, and this is the first and only time I have gotten into such a bind that I failed to complete a brief on time. As I stated in the motion to the Court of Appeals, I was greatly overextended by the work I had to do at the time, and was suffering from a series of respiratory illnesses that seriously interfered with my physical capability to handle the workload, and I became very depressed and somewhat non-functional for several months, the severity of which I recognize more in retrospect than at the time. Since I had not received any inquiry or expressions of concern about the briefs from either the Court or the respondent, I was shocked when I received the Orders of

Dismissal. I finished the briefs and filed them as soon as I could. At all times, my attitude and intention was to complete the work and prepare for argument before the court, and it never was my intention to cause any disruption to the

"Further affiant saith not."

JOHN M. STOKES

SWORN AND SUBSCRIBED TO BEFORE ME BY John M. Stokes on December 5th, 1986.

Notary Public in and for the State of Texas

Commission Expires:

6-23-90

Printed Name of Notary:

Lisa E Hedgecock

S E A L